

Application No.: 10/717,768
Filed: November 20, 2003
Page 9 of 13

Examiner: Frankie L. Stinson
Group Art Unit: 1746

REMARKS/ARGUMENTS

Claims 1-39 are pending in this application. Claims 9-12 and 28-31 were previously withdrawn from consideration pursuant to a species restriction. Claims 1-8, 13, 20-27, 32 and 39 stand rejected and claims 14-19 and 33-38 stand objected to.

Applicants appreciate the Examiner's indication of allowable subject matter in claims 14-19 and 33-38. Claims 1 and 21 have been cancelled without prejudice, and claims 40-42 have been added. Claims 2-4 have been amended to change their dependency from claim 1 to claim 40, and claims 22 and 23 have been amended to change their dependency from claim 21 to claim 42.

No new matter has been added by the foregoing amendments, full support therefore being shown in the drawings and specification as filed. All claims remaining in the application are believed to now be in condition for allowance.

Reconsideration and reexamination of the application is respectfully requested in view of the referenced amendments and the following remarks.

Rejection Under 35 U.S.C. §103

Claims 1-8, 13, 20-27, 32 and 39 stand rejected under 35 U.S.C. §103 (a) as being unpatentable over either U.S. Patent No. 2,501,887 to Cress or U.S. Patent No. 2,320,133 to Horwitz in view of U.S. Patent No. 1,997,849 to Bargar. This rejection is respectfully traversed.

Cress '887 discloses a dishwasher having a rotating cylindrical basket. A network of water nozzles discharge liquid upwardly through the floor of the basket, and laterally inwardly through the basket wall. The basket is rotated around a vertical axis while liquid is sprayed against dishes and silverware in the basket.

Horwitz '133 discloses a counter-top dishwasher having a pair of rotating spray arms with nozzles that are adapted to spray liquid downwardly, inwardly, and upwardly as the spray arms rotate around a basket containing utensils.

Bargar '849 discloses a counter-top dishwasher comprising a basket having a shelf pivotably mounted thereto at about the mid-height of the basket. The shelf can be folded down to support one or more small utensils above other utensils supported on the floor of the basket to

Application No.: 10/717,768
Filed: November 20, 2003
Page 10 of 13

Examiner: Frankie L. Stinson
Group Art Unit: 1746

form a double row of utensils. The shelf can also be folded up to enable large utensils to be supported on the floor of the basket. In either shelf configuration, the utensils are supported at a constant angle of inclination relative to an overhead liquid spray distributor.

Initially, claims 1 and 21 have been cancelled without prejudice. Thus, the rejection of claims 1 and 21 is moot.

The standards for a finding of obviousness must be strictly adhered to. Simply citing one or more prior art references that illustrate different facets of the invention and then concluding that it would be obvious to combine the references to create the applicant's invention is wholly inadequate.

A claimed invention is unpatentable if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art....The ultimate determination of whether an invention would have been obvious under 35 U.S.C. §103(a) is a legal conclusion based on underlying findings of fact.¹

A critical step in analyzing the patentability of claims pursuant to section 103(a) is casting the mind back to the time of invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and the then-accepted wisdom in the field....Close adherence to this methodology is especially important in cases where the very ease with which the invention can be understood may prompt one "to fall victim to the insidious effect of a hindsight syndrome wherein that which only the invention taught is used against its teacher."

Most if not all inventions arise from a combination of old elements....Thus, every element of a claimed invention may often be found in the prior art....However, identification in the prior art of each individual part claimed is insufficient to defeat patentability of the whole claimed invention....Rather, to establish obviousness based on a combination of the elements disclosed in the prior art, there must be some motivation, suggestion or teaching of the desirability of making the specific combination that was made by the applicant....Even when obviousness is based on a single prior art

¹ The underlying factual inquiries include (1) the scope and content of the prior art; (2) the level of ordinary skill in the prior art; and (3) the differences between the claimed invention and the prior art. *Graham v. John Deere Co.*, 383 U.S. 1, 17, 15 L. Ed. 2d 545, 86 S. Ct. 684 (1966).

Application No.: 10/717,768
Filed: November 20, 2003
Page 11 of 13

Examiner: Frankie L. Stinson
Group Art Unit: 1746

reference, there must be a showing of a suggestion or motivation to modify the teachings of that reference.

The motivation, suggestion or teaching may come explicitly from statements in the prior art, the knowledge of one of ordinary skill in the art, or, in some cases the nature of the problem to be solved....In addition, the teaching, motivation or suggestion may be implicit from the prior art as a whole, rather than expressly stated in the references....The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art....Whether the Patent Office Examiner relies on an express or an implicit showing, **the Examiner must provide particular findings related thereto....Broad conclusory statements standing alone are not "evidence."**

In Re Werner Kotzab, 217 F.3d 1365; 55 U.S.P.Q.2d (BNA) 1313 (Fed. Cir. 2000)(citations omitted)(emphasis added).

The Examiner has failed to identify any motivation, suggestion, or teaching of the desirability of combining either Cress '887 or Horwitz '133 with Bargar '849 to arrive at Applicants' invention. There has been no statement identified in the prior art as to the desirability of the asserted combination, there has been no discussion of the knowledge of one of ordinary skill in the art or the nature of the problem to be solved, there has been no identification of what the combined teachings, the knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to one of ordinary skill in the art as required for a showing of motivation. The Examiner has failed to provide any particular findings related to any motivation, suggestion, or teaching of the desirability of combining Cress '887 or Horwitz '133 with Bargar '849. The Examiner has simply relied upon "broad conclusory statements standing alone," which can only lead to the conclusion that the Examiner is simply relying on impermissible hindsight reconstruction of Applicants' invention.

In forming the combination, the Examiner recites at pages 2 and 3 of the Office Action the structure of the three prior art references and then states immediately thereafter, "It therefore would have been obvious to one having ordinary skill in the art provide either Cress or Horwitz, to include an utensil carrier as taught by Bargar, for the purpose of holding small dishes or

Application No.: 10/717,768
Filed: November 20, 2003
Page 12 of 13

Examiner: Frankie L. Stinson
Group Art Unit: 1746

articles near the outlet of the water spray assemblies." This logic is an example of a broad conclusory statement as it merely restates the function of Bargar. It does not in any way provide why it would be obvious to add the functionality of Bargar to the other two references, which do not themselves disclose the desirability of adding the Bargar functionality. Therefore, the combination fails to meet the *prima facie* standards for combining references and it must fail. As the combination fails, so does the rejection based on the combination.

Assuming, *arguendo*, that the combination could be made, it still does not reach the claimed invention. The combination, at best, would teach nothing more than the basket of Cress or Horwitz with the counter-weighted rack 60 of Bargar. The rack 60 of Bargar is nothing more than a stowable shelf, which can be selectively used. The rack 60 would be mounted to the elements 23 of Cress in a circular basket or to the angled elements 22 of Horwitz to provide them with the stowable shelf to provide for mounting more smaller items in the same space. It is worth noting that the addition of the racks 60 to the basket of Cress or Horwitz does not disclose a basket structure different from what is already shown in Bargar. This combination does not disclose an adjustable utensil carrier that is moveable between two positions to reorient the food contact surface of the utensil relative to the water spray assembly and the side spray assembly as called for and defined by the claims. As such, the claims are patentable.

Looking at the claims in greater detail, claim 40, which replaces claim 1, and claim 42, which replaces claim 21, in relevant part call for an adjustable utensil carrier located within the utensil holding space and adjustable for relative movement between a first position, where a food contact surface of a utensil carried by the utensil carrier is primarily directed toward the spray from one of the water spray assembly and the at least one side sprayer, and a second position, where the food contact surface is directed toward the spray from both the water spray assembly and the at least one side sprayer.

Any combination of Cress '887, Horwitz '133, and Bargar '849 does not disclose an adjustable utensil carrier which can move between a first position, where a food contact surface of a utensil carried by the utensil carrier is primarily directed toward the spray from one of the water spray assembly and the at least one side sprayer, and a second position, where the food contact surface is directed toward the spray from both the water spray assembly and the at least

Application No.: 10/717,768
Filed: November 20, 2003
Page 13 of 13

Examiner: Frankie L. Stinson
Group Art Unit: 1746

one side sprayer. The shelf of the combination from Bargar does not reorient the utensil that it carries when the shelf of the combination is moved from the stowed to the use position. In fact, it is impossible for the shelf of the combination to support the dish in both its stowed and use positions. As the shelf of the combination cannot support a utensil in the stowed position it is impossible for the combination to teach the claimed adjustable utensil carrier that is moveable between two positions and reorients the food contact surface of the utensil relative to the two sprays as claimed. Therefore, the combination is missing an entire element of the claims and claims 40 and 42 are patentable over the stated combinations.

Because claims 2-8 and 14-20 depend, directly or indirectly, from claim 40, and claims 22-27 and 32-39 depend, directly or indirectly, from claim 42, these claims are for the same reasons patentable over either Cress '887 or Horwitz '133 in view of Bargar '849.

Applicants request the withdrawal of the rejection of claims 1-8, 13, 20-27, 32 and 39, and the allowance of claims 2-8, 14-20, 22-27, and 32-42.

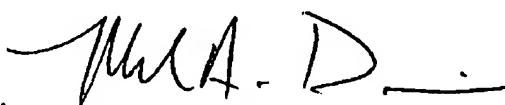
CONCLUSION

It is respectfully submitted that all of the pending claims in the application are allowable over the prior art of record. Early notification of allowability is respectfully requested.

Respectfully submitted,
JAY C. LANDSIEDEL ET AL.

Dated: 11/23/05

By:


Mark A. Davis, Reg. No. 37,118
Michael F. Kelly, Reg. No. 50,859
McGARRY BAIR PC
171 Monroe Avenue, NW, Suite 600
Grand Rapids, Michigan 49503
616-742-3500

G0198007.DOC